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Copyright and the digital economy: Submission to ALRC Discussion Paper 79.

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I endorse the ALRC's proposal that fair use be introduced into Australian copyright law. In this submission, I want to address one key point: Australia should take the opportunity to clearly permit transformative uses of existing material, without requiring consideration of all four fairness factors. The key test should be the effect on the core licensing market of existing copyright expression. To accomplish this, a new transformative use exception should be introduced into Australian law. Alternatively, it should be presumptively fair to make a transformative use of existing material, regardless of commercial purpose, the character of the plaintiff's work, and amount and substantiality of the portion used, if the transformative work does not displace the market for the existing material.

While modelling an Australian fair use provision on existing US legislation is desirable in general terms, Australia has the opportunity to clarify some of the outstanding difficulties of US fair use law. In order to encourage creativity and a diverse culture, transformative uses – uses of existing material that are not substitutable for the original and do not displace core licensing markets – should presumptively be excluded from the copyright grant. Recent case law, including *The Panel*¹ and *Kookaburra*,² demonstrates that current Australian law does not adequately enable contemporary creative practices. The US fair use test goes some way to enabling transformative uses, but conflicting circuit court reasons in recent cases, like *Bridgeport Music*³ and *Newton v Diamond*,⁴ or *Suntrust v Houghton Mifflin*⁵ and *Salinger v Colting*,⁶ show that authors face continuing difficulties in showing that their creative borrowing is permissible. A clear fair use exception should be introduced that will allow (amongst other things) Australian creators to reuse existing copyright material in the creation of new works.

Creativity is always informed by previous works; our future culture will always be built upon the past.⁷ Because borrowing is fundamental to artistic practice, any copyright law that requires licensing of creative influences acts as a tax on creativity. Restrictions on borrowing create disincentives for the creation of new work; enable existing owners to veto new expression;⁸ cause artists to self-censor;⁹ and introduce non-trivial transaction costs that slow the creative process. Allowing creative borrowing, by contrast, imposes little harm on the revenues of copyright owners. The market for *Kookaburra Sits in an Old Gum Tree* was not displaced by *Down Under*;¹⁰ Channel

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1 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273.

2 *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47 (31 March 2011).

3 *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005)

4 *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1252 (C.D. Cal. 2002), affirmed, 388 F.3d 1189 (9th Cir. 2004), cert. denied, 125 S.Ct. 2905 (2005).

5 *Suntrust v. Houghton Mifflin Co.*, 252 F. 3d 1165 (11th Cir. 2001).

6 *Salinger v Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009); *Salinger v Colting*, 607 F.3d (2d Cir. 2010).

7 See Nicolas Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 297, 318–322.

8 Melissa De Zwart, 'Seriously Entertaining: The Panel and the Future of Fair Dealing' (2003) 8 *Media & Arts Law Review* 1, 16–17 (arguing that The Panel case 'provides a good example of circumstances in which a licence would not be granted').

9 P Aufderheide and P Jaszi, 'Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers' (Center for Social Media Washington, DC, 2004) <<http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>>; Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011) 188.

10 See Elizabeth Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer? - Case Note; EMI

Nine did not lose advertising revenue because people could watch their clips on *The Panel* instead.¹¹ Certainly, both Men at Work and Network Ten derived benefit from using existing material. Their use, however, imposed no harm. The only way these decisions can be justified is by taking a restitutionary view of copyright: assuming that benefits derived from use are interferences with the property right of copyright owners that should be protected.¹² It is tautological to claim that harm is done because copyright owners have a right to control transformative uses of their work. This proposition begs the question: what rights should form part of the exclusive rights of copyright owners?

The right to control transformative uses of existing material should not form part of the exclusive rights of copyright owners. In terms of efficiency, Australia's goal to improve its innovation economy depends on the ability of Australians to access and improve upon our knowledge and cultural resources.¹³ In the interests of encouraging innovation, we should prefer a construction of copyright that enables Australians to derive benefit from reusing existing works where their use imposes little harm to the market of the original. In terms of fairness, we should prefer a copyright law that supports decentralised creativity.¹⁴ Because popular, established works are likely disproportionately used in the creation of new work, a requirement that future authors pay for creative debts to past authors is a regressive tax that transfers wealth from less established authors to more established ones. This is harmful for emerging artists, for amateurs playing with culture, and for values of diversity in speech. Unless the right to control transformative uses can be shown to be necessary to incentivise investment (this might be true in certain limited cases, such as music synch rights) it is actually likely to be counterproductive in terms of encouraging creativity¹⁵ and supporting artists.

From this normative position, it should be clear that the exclusive right to control derivatives should be more closely linked to the narrow right of adaptation, rather than the current effective right to control all recognisable uses of expression in future works. Because, as Gordon argues, "culture is interdependence",¹⁶ a copyright law that seeks to encourage creativity should not conflate artistic debts with monetary ones. From this perspective, subjecting transformative uses to a four-factor fair use analysis is not useful. The major problem is that in common discourse, the normative concept of 'fairness' does not clearly represent what is efficient and socially desirable. The positioning of copyright law as centred on protecting romantic authorship has created a discourse that preferences established authors to the detriment of 'mere' amateurs, 'postmodern' appropriation artists,¹⁷ or 'free-riders'. The current debate seems to embody a restitutionary view of fairness that does not adequately respect the authorship interests of decentralised and emerging creators. Jessica Litman aptly summarises the argument:

Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd (2013) 23 *Australian Intellectual Property Journal* 142, 155; Peter Knight, 'Fair Use or Fowl? Reconsidering Fair Use Defences in *Larrikin Music Publishing v EMI*' (2010) 22 *Australian Intellectual Property Law Bulletin* 172, 173 (arguing that Down Under is not substitutable for Kookaburra); Steve Collins, 'Kookaburra V. Down Under: It's Just Overkill' (2010) 7 *Scan: Journal of Media Arts Culture* <http://scan.net.au/SCAN/journal/display.php?journal_id=145> ('In the context of 'Down Under' and 'Kookaburra ...' it is difficult to conceive of a situation in which an individual would purchase the former over the latter in pursuit of enjoying the melody from 'Kookaburra ...').

11 Michael Handler and David Rolph, 'A Real Pea Souper: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381, 405 (arguing that the court did not adequately enquire about 'whether the defendant's use competes with or supplants the market for the plaintiff's broadcast.').

12 DJ Brennan, 'The Beautiful Restitutionary Heresy of a Larrikin' (2011) 33 *Sydney L. Rev.* 209.

13 Cutler & Co, 'Venturous Australia - Building Strength in Innovation' (Report for the Minister for Innovation, Industry, Science and Research, 2008) <<http://www.innovation.gov.au/Innovation/Policy/Pages/ReviewoftheNationalInnovationSystem.aspx>>.

14 Julie E Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 *UC Davis Law Review* 1151.

15 DE Bambauer, 'Faulty Math: The Economics of Legalizing The Grey Album' (2008) 59 *Alabama Law Review* 345.

16 Wendy J Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 *Virginia Law Review* 149, 168.

17 AIPP Submission #564, p 5.

“Nurturing authorship is not necessarily the same thing as nurturing authors. When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship.”¹⁸

If we accept that copyright should enable and encourage decentralised authorship, at least where that does not conflict with the ability of authors and publishers to recoup their investments, then it becomes clear that the only relevant test in transformative use cases is the effect on the market. An important qualification here is that **a transformative use exception should not be displaced by the availability of private licensing agreements**. The appropriate scope of copyright should be determined by legislation; it is wholly appropriate for Australia to conclude that the copyright monopoly does not extend to controlling transformative uses on efficiency and fairness grounds. In this case, the fact that a use can be licensed should not be confused with the normative conclusion that licensing is not required.¹⁹ The implication is that the 'effect upon the market' test must be limited to direct substitution, unless the work is in a category of works where there is clear evidence to support public policy that copyright owners ought to be entitled to control derivative uses.

The other three fair use factors are not relevant in determining whether an unlicensed transformative use should be permissible. After the threshold of transformativeness has been passed, **commerciality should not alter the fair use analysis**. Principle 2 requires that copyright maintain incentives for the creation of new works. In order to create a system where Australians can derive a benefit from licensing their works, future creators should not be discouraged from engaging in commercial reuse of existing material that imposes no harm on the incentives of the original creator/publisher of that material.

Similarly, **'the nature of the copyrighted work' should have a limited impact on the ability to engage in transformative uses**. In particular, the fact that the plaintiff's work was a creative work should not make it more difficult to use that material in the production of a new creative work. There are very good reasons that creators may wish to reuse existing creative expression – including for its impact²⁰ and because of a personal connection the author has with the existing work.²¹ In the interests of promoting creative practice, it is counterproductive to limit the range of material available for reuse by reference to its creative nature. To do so requires judicial examination of artistic decisions (could another work have been used?) – an enterprise that is notoriously problematic.

Finally, **the 'amount and substantiality' test is also unhelpful in transformative uses**. Rebecca Tushnet has powerfully argued that there are very important legitimate reasons why authors may choose to quote much or all of an existing work;²² asking whether a defendant took more than was necessary to fulfil her purpose is just as problematic as asking whether another work could have been used instead. In the US, this factor has led to a strange distinction where *The Wind Done Gone* was potentially fair use,²³ but *60 Years Later* was not.²⁴ Neither was likely to damage the market for the original; if copyright law aims to encourage creativity (or at least not unnecessarily harm it), both should be permissible.

For these reasons, it is probably more desirable that a separate transformative use exception be introduced, in addition to a general fair use exception. The Discussion Paper notes that there is

18 Jessica Litman, 'Public Domain, The' (1990) 39 *Emory Law Journal* 965, 969.

19 Wendy J Gordon and Daniel Bahls, 'The Public's Right to Fair Use: Amending Section 107 to Avoid the Fared Use Fallacy' [2007] *Utah Law Review* 619.

20 Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It.' (2004) 114 *Yale law journal* 535.

21 Rebecca Tushnet, 'Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children' (2011) 86 *Notre Dame L. Rev.* 2133.

22 Tushnet, 'Copy This Essay', above n 20.

23 *Suntrust v. Houghton Mifflin Co.*, 252 F. 3d 1165 (11th Cir. 2001),

24 *Salinger v Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009); *Salinger v Colting*, 607 F.3d (2d Cir. 2010).

some difficulty in drawing a line between 'adaptations' (which must be licensed) and 'transformative uses' (which may be the subject of an exception). This is important, and creating a bright line rule is not straightforward, but neither would it be impossible. More consultation is required on this point – it will be important to identify how the purpose of copyright is best advanced, and this likely requires identifying the circumstances in which the right to control derivative uses are important to the incentives of producers. It seems reasonable to suggest, however, that the proper scope of the adaptation right might be much more limited than the current combination of the exclusive rights of reproduction and adaptation provides. If encouraging authorship and diversity in expression is the goal of copyright, the right to control derivatives should likely be narrowly tailored to direct translations and adaptations, rather than retellings, remixes, pastiches, mashups, prequels or continuations. The protections afforded by trade mark law, passing off, and the right of integrity may well be sufficient in most cases to protect the legitimate interests of authors and producers.

Use by third parties

It is important to remember that **transformative works must be able to be disseminated, including by third parties as appropriate**. The ALRC notes several concerns that third parties should not be entitled to benefit ('free-ride') by enabling or facilitating others to exercise their fair use rights. With respect, these concerns are misguided. They again depend upon a restitutionary view of copyright, and ignore an important point: once a new non-infringing work has been created, our copyright system must still provide for it to be distributed. The reason that exceptions exist for productive uses is that they provide social value; in order for these exceptions to be effective, then, the material must be able to be distributed, and this implies that the help of third parties must be able to be enlisted. So, for example, when a researcher quotes an extract of a published work in a scholarly paper, the purpose of copyright is furthered when that work is distributed. When a new author creates a new song that borrows from existing works, the purpose of copyright is furthered when that new work is distributed. In order to avoid a tragedy of the anticommons,²⁵ the creator of the new work in each case must have the exclusive right to enter into a licence agreement with a distributor, and the subsequent communication of that work should not trigger liability against the owners of any works that have been used in its creation. In these examples, neither a scholarly publisher nor YouTube should be liable for communicating the underlying copyright works to the public, and they should not be required to demonstrate that they are engaging in a fair use of the original. If the reason we permit transformative uses is to enable new works to be created, it makes no sense to argue, as APRA/AMCOS does, that “[a]ll subsequent uses are, by definition, not themselves transformative” and should therefore “not be the subject of [a transformative use] exception”.²⁶

25 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1997) 111 *Harvard Law Review* 621.

26 ALRC Discussion Paper DP79, p 205.